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No. 94-520

In the Supreme Court of the United States

OCTOBER TERM, 1994

FLORA SULLINS, PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

After an administrative law judge denied petitioner's application for disability insurance benefits and supplementary security income benefits, petitioner submitted new evidence to the Appeals Council. The Appeals Council considered the evidence but denied further review. The question presented is whether, in light of the new evidence, substantial evidence supports the Secretary's decision to deny benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 25 F.3d 601. The opinion of the district court (Pet. App. 9a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1994. A petition for rehearing was denied on June 23, 1994. Pet. App. 27a. The petition for a writ of certiorari was filed on September 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following initial denial of an application for disability benefits or supplemental security income benefits under the Social Security Act, the applicant may request a hearing before an administrative law judge (ALJ). 20 C.F.R. 404.900(a)(3), 416.1400(a)(3). If the ALJ denies benefits, the applicant may then petition the Appeals Council for review of the ALJ's decision. 20 C.F.R. 404.900(a)(4), 404.970, 416.1400(a)(4), 416.1470.

The regulation states that the Appeals Council will review a case if:

> (1) There appears to be an abuse of discretion by the administrative law judge;
>
> (2) There is an error of law;
>
> (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or
>
> (4) There is a broad policy or procedural issue that may affect the general public interest.

20 C.F.R. 404.970(a), 416.1470(a). In addition, if the applicant submits "new and material evidence" in support of her petition for review, the Appeals Council "shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision." 20 C.F.R. 404.970(b), 416.1470(b). The Appeals Council "shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record." 20 C.F.R. 404.970(b); see 20 C.F.R. 416.1470(b).

When the Appeals Council grants review, the Appeals Council's decision constitutes the "final decision of the Secretary" for purposes of judicial review under 42 U.S.C. 405(g). When the Appeals Council denies review of the ALJ's decision, the decision of the ALJ becomes the final decision of the Secretary for purposes of judicial review. See 20 C.F.R. 404.955(b), 404.981, 416.1455(b), 416.1481. In either event, the reviewing court determines whether the Secretary's decision is supported by substantial evidence in the administrative record as a whole. 42 U.S.C. 405(g); see, *e.g.*, *Smith* v. *Heckler*, 735 F.2d 312, 315 (8th Cir. 1984).

2. In November 1990, petitioner applied for disability insurance benefits (DIB) under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, and supplemental security income (SSI) benefits under Title XVI of the Act, 42 U.S.C. 1381 *et seq.*, alleging that she became disabled on February 15, 1990, due to back pain, headaches, foot and "female problems." Pet. App. 2a, 18a. Petitioner did not allege any disabling mental impairments in her application for disability benefits. *Id.* at 6a-7a. Petitioner's claims were denied initially and upon reconsideration. *Id.* at 2a.

3. Petitioner requested a hearing before an ALJ. In a decision dated September 25, 1991, the ALJ concluded that petitioner was not disabled. Pet. App. 18a-26a. The ALJ found that petitioner had not engaged in substantial gainful activity since February 15, 1990, and last met the disability insured status requirements under Title II of the Social Security Act on June 30, 1990. Pet. App. 24a. At the ALJ hearing, petitioner testified regarding several ailments, including back pain, headaches, shortness of breath, numbness in her arms and legs, foot pain, anxiety and depression. *Id.* at 19a-22a. Based on the testimony of petitioner and a vocational expert, as

well as the medical assessments offered by petitioner's treating physicians and consulting specialists, the ALJ concluded that the medical evidence did not establish a disabling physical impairment, *id.* at 25a, or any symptoms or diagnosis of a mental impairment, *id.* at 22a. Based on the vocational expert's testimony that petitioner retained residual functional capacity to work as an assembly line worker or cashier, the ALJ concluded that petitioner was not disabled at any time through the date of his decision, September 25, 1991. *Id.* at 25a-26a.

4. On October 12, 1991, approximately three weeks after the ALJ's decision finding petitioner not disabled, petitioner was examined by a psychiatrist, Dr. Gerald Fowler. Dr. Fowler expressed the view that petitioner suffered from several mental impairments, that the impairments "had not improved significantly within the past 12 months," and that her condition was not expected to improve within the next year. See Pet. App. 3a, 7a n.5. Petitioner submitted Dr. Fowler's psychiatric report to the Appeals Council in support of her request that it review the ALJ's decision. *Id.* at 17a.

The Appeals Council considered Dr. Fowler's report along with additional office notes provided by one of petitioner's treating physicians, but concluded that there was no basis under the 20 C.F.R. 404.970(a) criteria (quoted at page 2, *supra*) for granting review of the ALJ's decision. Pet. App. 16a-17a. The Appeals Council found that "the information provided by Dr. Fowler [was] not relevant to the issue of whether [petitioner was] disabled on or before September 25, 1991," the date of the ALJ's decision. *Id.* at 17a.[1]

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[1] The Appeals Council noted that petitioner could request a determination on the issue of disability after September 25, 1991 by

5. The district court affirmed the Secretary's final decision, Pet. App. 9a-14a, holding that there was ample support in the record for the ALJ's conclusion that petitioner was not disabled within the meaning of the Act. *Id.* at 14a. The district court considered the new evidence petitioner had submitted to the Appeals Council, but declined to give weight to Dr. Fowler's psychiatric report because the report was based on a one-time consultation undertaken by Dr. Fowler specifically in connection with the benefits determination, it consisted largely of petitioner's recitation of her symptoms, and it was irreconcilable with the records of petitioner's treating physicians. *Id.* at 13a-14a.

6. The court of appeals affirmed the district court's decision. Pet. App. 1a-8a. Petitioner contended that the ALJ's decision should be reversed because it was not supported by substantial evidence. In the alternative, petitioner requested that the court remand the case with instructions to obtain vocational expert testimony that would take into account her alleged mental impairments, including the post-ALJ decision submission of Dr. Fowler. *Id.* at 4a. [2]

The court of appeals rejected those contentions. The court concluded that substantial evidence supported the ALJ's determination that petitioner's subjective com-

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filing a new application, and that she could submit Dr. Fowler's report in support of such a claim. Pet. App. 17a. We have been informed by the Department of Health and Human Services that petitioner filed a new application for SSI benefits on July 1, 1993, which the Secretary granted, and that she has been receiving benefits since December 14, 1993.

[2] Petitioner stated in her brief that "the *severity* of [her] mental condition did not come to light until three months *after* the administrative hearing when claimant saw Dr. Fowler." Appellant's C.A. Br. 25.

plaints of pain were not credible. Pet. App. 4a-6a. The court also held that the ALJ did not err in failing to include a hypothetical question to the vocational expert that took into account petitioner's alleged mental impairments. *Id.* at 6a-8a. The court found it significant that there were no signs or symptoms of an ongoing psychiatric impairment in any of her medical records, that there was no showing that she was diagnosed with or received treatment for a psychiatric impairment by either a mental health professional or one of her treating physicians, and that petitioner did not allege a disabling mental impairment in her application or offer such an impairment as a basis for disability at the ALJ hearing. *Id.* at 7a. The court also noted that Dr. Fowler's consultative report, which suggested at least a current mental impairment, was not part of the medical record before the ALJ and that "[a]n ALJ ordinarily has no obligation to investigate claims not presented at the time of the application for benefits and not offered at the hearing as a basis of disability." *Id.* at 7a-8a. Indeed, the court observed that when formulating the hypothetical, the ALJ "specifically asked [petitioner's] attorney whether he had covered all of the factors relevant to [petitioner's] ability to perform other work. Neither [petitioner] nor her attorney raised the issue of mental impairments." *Id.* at 6a n.2.

On June 23, 1994, the court of appeals denied rehearing and rehearing en banc. Pet. App. 27a.

ARGUMENT

1. Petitioner concedes that, because the Appeals Council declined to review the ALJ's decision, the ALJ's decision constituted the "final decision" of the Secretary for purposes of judicial review under 42 U.S.C. 405(g). Petitioner also concedes (Pet. 6-7) that she did not

submit Dr. Fowler's report until after the ALJ rendered his decision. She nevertheless contends that in reviewing the ALJ's decision to determine whether it was supported by substantial evidence, the district court was required to consider Dr. Fowler's report along with the evidence that was before the ALJ. That contention is incorrect. Although several courts of appeals (including the Eighth Circuit in prior cases) have agreed with petitioner's position, the issue does not warrant review by this Court here.

As petitioner points out (Pet. 9-11), under Eighth Circuit precedent, when a claimant submits new evidence to the Appeals Council pursuant to 20 C.F.R. 404.970(b) after the ALJ has rendered a decision, and the Appeals Council considers the evidence but declines to review the case, the reviewing court is to determine "whether the administrative law judge's determination is supported by substantial evidence on the record as a whole, including the new evidence submitted after the determination was made." *Riley* v. *Shalala*, 18 F.3d 619, 622 (8th Cir. 1994); see also *Nelson* v. *Sullivan*, 966 F.2d 363, 366 (8th Cir. 1992) ("If, as here, the Appeals Council considers the new evidence but declines to review the case, we review the ALJ's decision and determine whether there is substantial evidence in the administrative record, which now includes the new evidence, to support the ALJ's decision."); *Browning* v. *Sullivan*, 958 F.2d 817, 823 (8th Cir. 1992) (same).

Petitioner supports the approach followed by the Eighth Circuit, but contends that it was not followed in this case. In fact, however, her claim was correctly rejected by the district court under that approach. Petitioner submitted new evidence to the Appeals Council three months after her ALJ hearing and about three weeks after the ALJ had rendered a decision. The

Appeals Council considered the report submitted by Dr. Fowler. Pet. App. 17a. Even though the Appeals Council concluded that the new evidence was not relevant to the time period preceding the ALJ's decision, the district court, in accordance with Eighth Circuit precedent, considered the new evidence as part of the record as a whole. After weighing all of the evidence of record, and specifically evaluating the new evidence, the district court concluded that substantial evidence still supported the ALJ's decision to deny benefits. Pet. App. 14a.

The court of appeals affirmed the district court's decision, Pet. App. 1a-8a, specifically noting the district court's determination that substantial evidence on the record as a whole supported the ALJ's finding that petitioner was not disabled, *id.* at 4a. It noted that Dr. Fowler's evidence had not been submitted to the ALJ. *Id.* at 7a-8a. Petitioner argues (Pet. 11-12, 14-15) that, under Eighth Circuit precedent, the panel should have weighed that evidence in deciding whether the ALJ's decision was supported by substantial evidence on the record as a whole. The panel, however, did not expressly depart from the Eighth Circuit decisions relied upon by the petitioner and quoted above; it did not cite those decisions, did not advert to the fact that Dr. Fowler's report was submitted to the Appeals Council, and did not discuss the legal significance of such a submission. See Pet. App. 3a-4a, 7a-8a. The decision below, therefore, does not, on its face, conflict with Eighth Circuit precedent, and such an intra-circuit conflict would not, in any event, warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).[3]

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[3] The court of appeals concluded that petitioner did not produce evidence that she suffered fron a mental impairment prior to June 30, 1990, the date she last met the special earnings

2. Petitioner argues (Pet. 9, 11, 14) that the court of appeals' decision conflicts not only with previous decisions of the Eighth Circuit, but also with decisions of the Fourth and Eleventh Circuits, which similarly hold that the reviewing court should weigh evidence that was considered by the Appeals Council, even when the Appeals Council denies review. See *Keeton* v. *DHHS*, 21 F.3d 1064, 1067 (11th Cir. 1994); *Wilkins* v. *DHHS*, 953 F.2d 93, 96 (4th Cir. 1991). In contrast, the Seventh and Sixth Circuits have held, in accordance with the position of the Secretary, that a reviewing court may not reverse

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requirements for disability beneifts. Pet. App. 6a, 8a. Dr. Fowler did not conduct his examination until October 12, 1991, fifteen months after that date. *Id.* at 3a. His assessment was based on petitioner's description of her past life and limited diagnostic tests. The diagnostic tests did not include more comprehensive testing (*e.g.*, IQ tests, Minnesota Multiphasic Personality Inventory, etc.) that might have related to the period at issue in the final decision of the Secretary. The report did not elaborate on or specifically address any mental impairment existing prior to June 30, 1990. *Ibid.*

With respect to her claim for SSI benefits, the ALJ concluded that substantial evidence in the record did not support a finding of any type of disability "at any time through the date of this decision," which was September 25, 1991. Pet. App. 26a. The Appeals Council concluded that Dr. Fowler's report was not relevant to the question of petitioner's disability prior to that date. *Id.* at 17a. Dr. Fowler's report indicated that petitioner's condition, as described by him in the report, had not improved in the preceding twelve months. *Id.* at 3a. Consequently, his report could be construed as relevant to the time period preceding the ALJ's decision. The district court considered Dr. Fowler's report in detail and concluded that the report did not alter its conclusion that substantial evidence supported the ALJ's decision denying all benefits through September 25, 1991. *Id.* at 13a-14a. In her petition for certiorari, petitioner has presented no distinct question concerning her eligibility for SSI benefits.

an ALJ's decision based on evidence first submitted to the Appeals Council. *Eads* v. *DHHS*, 983 F.2d 815, 817-818 (7th Cir. 1993); *Cotton* v. *Sullivan*, 2 F.3d 692, 695-696 (6th Cir. 1993) (discussing *Eads*). Because this case arose in the Eighth Circuit, where a contrary rule is well established—and because the panel in this case did not specifically address the issue—this would not be an appropriate case for consideration of the issue by the Court.

We note as well that the extent to which the Appeals Council considers evidence submitted to it in the first instance is a matter that can be conclusively resolved by regulation. Indeed, in September 1994, the Commissioner of Social Security released a study and proposal for restructuring of the administrative process for review of disability claims. Social Security Admin., U.S. Dep't of Health and Human Services, Pub. No. 01-005, *Plan for a New Disability Claim Process* (1994), *reprinted at* 59 Fed. Reg. 47,887 (Sept. 18, 1994). The proposal suggests a revised role for the Appeals Council, and contemplates that the Appeals Council's review of an individual case, to the extent it chooses to review the case, will be limited to the record that was before the ALJ. See *id.* at 35-36. Review by this Court of an issue concerning that particular aspect of the existing process is unwarranted while the restructuring is under consideration. Cf. *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991); *Richardson* v. *Wright*, 405 U.S. 209, 209 (1972).

Moreover, in this case, the district court did consider Dr. Fowler's report in holding that the ALJ's decision was supported by substantial evidence. Pet. App. 13a-14a. Dr. Fowler's report was prepared more than fifteen months after petitioner last was insured under Title II of the Act, and she is currently receiving SSI benefits

under Title XVI. See note 1, *supra*. Thus, the particular circumstances of this case likewise do not suggest an occasion for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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